IN THE

Supreme Court of the United States

OCTOBER TERM, 1942

No. 517

GAETANO AJELLO,
Petitioner,

vs.

PAN AMERICAN AIRWAYS CORPORATION,
Respondent,

and

DOUGLAS AIRCRAFT COMPANY, INC.,
Intervenor-Respondent.

BRIEF FOR RESPONDENTS ON PETITION FOR WRIT OF CERTIORARI

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I

Statement

This is an action for alleged infringement of patent No. 1,545,808 granted to plaintiff July 14, 1925 (and therefore now expired) on an application filed February 28, 1923, for "Safety Device for Aircraft". We know of no other litigation on the patent.

The opinion of the district court is reported: 38 F. Supp. 673. As to the single claim in suit (number 8), that court held:

> "There has been a complete failure to prove infringement, and the persuasive evidence is quite to the contrary." (38 F. Supp. at p. 675, second column)[1]

[1] Our references are to the printed opinions because we have not been served with a copy of the record in this Court.

The district court also had serious doubt as to the validity of the patent, both for lack of invention and for lack of operability, but made no finding on that subject, for the reasons stated (*ibid.*).

The *per curiam* opinion of the Court of Appeals is likewise reported: 128 F. (2d) 196. It shared the district court's doubt as to validity (p. 197, first column), but found it unnecessary to answer that question, and affirmed the judgment below for non-infringement.

Thus the fundamental issue as to which review is sought, so far as we comprehend petitioner's brief, is that of infringement (Petitioner's brief, p. 1, line 1). The quotation on the same page, as to abandonment to the public, is an allusion to the opinion of the Court of Appeals found at p. 197 of 128 F. (2d), about the middle of the first column, holding that, in accepting the limited claims granted by the Patent Office, the patentee makes his own bargain and "abandons to the public all that he does not reserve in his claims".

No conflict with any other decision, in the Second Circuit or elsewhere, is suggested by petitioner; and the review sought seems to be only as to concurrent holdings of non-infringement in both courts below.

II

The Patent in Suit

No such airplane as that disclosed in the patent was ever built (Rec. 262; 287-8; 217; 314, § 9).[1]

The patent is directed to the provision of "*additional* or *emergency* surfaces to act as resistance or brake means at landing or against flight or fall, or to act as elevators for a quick take off * * *" (Patent, p. 1, Rec. 328, line 10, our emphasis). This is accomplished, according to the disclosure (Figures 1 and 2) by simultaneously opening, oppositely and in a hinge-like manner, the parts 1 and 2 of

[1] These citations are to the record as it was in the Court of Appeals.

the upper and lower surfaces, respectively, of the wing. The upper surface is hinged at the rear and opens toward the front; the lower surface is hinged at the front and opens toward the rear (Fig. 2). Hence, in effect, in case of an emergency, it is proposed that the airplane should be converted from a monoplane into a biplane (Rec. 215, bottom), by opening the two surfaces. This is specifically stated in the patent, viz., that the wing structure is "so devised and controlled as to become, in effect, a multi-plane structure" (Rec. 328, line 32 *et seq.*).

The accused machines are four models of Sikorsky flying boats; the Boeing Model 314, known as the "Transatlantic Clipper"; and two models of Douglas machines, commonly in use throughout the United States. The Pan American Airways Corporation, the original defendant, is an operating company, a user of airplanes. The Douglas Company has intervened and is one of the respondents here. It is a manufacturer of the last named two models.

What is complained of in the accused machines is simply the common single landing flap, well known since about the close of the first World War (Rec. 203, bottom) and shown in the prior art (Rec. 392, 379, 372, 384). None of the accused machines have wing or flap constructions such as disclosed in the patent. They do not have any double-acting structure like the surfaces 1 and 2, nor do they have any flap opening in the upper surface. They do not respond to the terms of claim 8, the single claim in suit. This was specifically held by the Court of Appeals, as to the details of respondents' mechanical constructions (p. 197 of 128 F. (2d), first and second columns). In so holding, with respect to the limited claims which petitioner was allowed by the Patent Office, the Court of Appeals said:

> "All he got and all he asked for was a limited specific structure, a species of an already well known device, which with the passage of time his mind has apparently transmuted into a 'revolutionary' invention. So to read the claims would do more than twist them like 'a nose of wax'; it would be a major feat of plastic surgery."

III

Conclusion

There is nothing unusual about the present action, unless it be that it has been principally conducted by petitioner *pro se*. The issues were the usual ones of validity and infringement. Both courts below held that there was no infringement, and both seriously doubted validity. The patent has now expired. No other actions are shown to have been brought upon it. There is no suggestion that litigation could have been only in the Second Circuit.

Non-infringement is believed clear upon the concurrent holdings of both courts below; because of the remoteness of the accused structures from any disclosure of the patent; because the accused structures do not respond even to the terms of the single claim in suit; and because the patentee abandoned, because of the prior art cited by the Patent Office, any claim for a broad combination and accepted the present claims to "a limited specific structure" which respondents do not use, as the Court of Appeals held: 128 F. (2d), at page 197, near the middle of the second column.

It is respectfully submitted that the petition should be denied.

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